Supreme Court, U.S.
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No. 01-535

IN THE

Supreme Court of the United States

CAREMARK RX, INC. and MEDPARTNERS ACQUISITION CORPORATION,

Petitioners

v.

BRANDON, JONES, SANDALL, ZEIDE, KOHN, CHALAL & MUSSO, P.A., *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federal court of appeals have appellate jurisdiction under either 28 U.S.C. § 1292(a) or 9 U.S.C. § 16(a) when there has been no underlying order or ruling on the pending motion by the district court and there is no threat of irreparable harm to any of the parties by the absence of an order or ruling?

LIST OF PARTIES AND INFORMATION REQUIRED BY RULE 29.6

Petitioner Caremark RX, Inc., formerly known as MedPartners, Inc., has no parent company and no publicly held company owns 10% or more of its stock. The parent company of petitioner MedPartners Acquisition Corporation is Caremark RX, Inc., which owns 100% of its stock.

The respondents are Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A., d/b/a Orthopedic Center of Palm Beach County; Joseph B. Chalal, M.D.; Marvin A. Kohn, M.D.; Emilio Musso, M.D.; Edward W. Sandall, M.D.; and Michael S. Zeide, M.D.

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PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, ENTERED AND FILED APRIL 30, 2001 ..... 1a

PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 28, 2001 ..... 5a

Petitioners, Caremark RX, Inc. (sometimes "MedPartners" or "petitioner") and MedPartners Acquisition Corporation (collectively "petitioners"), respectfully request this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this action on April 30, 2001.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit at issue is not reported. The Eleventh Circuit's opinion is reproduced in the Appendix at pages 1a-2a. The district court did not issue any order or ruling.

JURISDICTION

The judgment sought to be reviewed was dated and entered on April 30, 2001. (App. 3a-4a). Petitioners filed a timely petition for rehearing and rehearing *en banc*, which the court of appeals denied by an order dated and entered on June 28, 2001. (App. 5a-6a). This petition for a writ of certiorari is being filed within 90 days after the petition for rehearing and rehearing *en banc* was denied. This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 28 U.S.C. § 1292(a) and 9 U.S.C. § 16(a). These jurisdictional statutes read, in pertinent part, as follows:

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

9 U.S.C. § 16. Appeals

> (a) An appeal may be taken from —
>
> (1) an order —
>
> (A) refusing a stay of any action under section 3 of this title. . . .
>
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title.

STATEMENT OF THE CASE

A. The Events Leading To This Action.

MedPartners, a corporation headquartered in Birmingham, Alabama, entered into a twenty-year contract with respondent Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A., d/b/a Orthopedic Center of Palm Beach County ("respondent" or "the Orthopedic Center") in January 1994. (R4-21-Ex. A; R5-38-2). Under the terms of the parties' agreement, petitioner agreed to manage respondent's physician practice in Palm Beach, Florida. (*Id*). As part of its management responsibilities, petitioner is to determine the amount of compensation owed to the Orthopedic Center's five principal shareholders. (R5-38-2). The five shareholders are entitled to receive guaranteed bonus

compensation in the event the physicians at the Orthopedic Center maintain the same level of performance in their practices as they maintained prior to the execution of the contract between petitioner and respondent. (*Id*). The parties' agreement also contains a *limited* arbitration clause, providing solely for the arbitration of disputes involving "what amount is owed by MedPartners . . . where a payment is due." (R5-38-3).

In April 1999, MedPartners determined that the physicians' performance had dropped drastically below their pre-1994 level of performance and that the five principal shareholders were not entitled to any bonus compensation under the terms of the contract. (R5-36-Ex. A). As a result, MedPartners reduced the shareholders' compensation for the month of April 1999 by approximately $270,000 because of the drop in performance by the physicians. (R5-38-4). Pursuant to the arbitration provision contained in the parties' agreement, respondent demanded arbitration limited to the issue of the calculation of the monthly bonus compensation for April due the shareholders. (*Id*). MedPartners agreed to arbitrate this claim pursuant to the terms of the parties' arbitration agreement. Shortly before the arbitration hearing took place, however, respondent amended its arbitration demand to include a claim for anticipatory breach of contract, seeking damages in excess of $48 million against petitioner for future breaches over the remaining fifteen years of the contract. (R5-38-6).

Petitioner requested the American Arbitration Association ("AAA") to continue the arbitration hearing and to dismiss the newly added claim of anticipatory breach on the ground that it did not fall within the scope of the parties' limited arbitration agreement. (R5-38-7). The AAA denied petitioner's request for a continuance and refused to dismiss the claim for anticipatory breach. (*Id*). The AAA then proceeded toward the arbitration hearing on an expedited basis. (*Id*).

B. Proceedings In The Trial Courts.

On July 19, 1999, MedPartners filed an action in the Circuit Court of Jefferson County, Alabama, seeking to enjoin the AAA from impermissibly arbitrating the non-arbitrable anticipatory breach claim asserted by respondent against petitioner. (R5-38-8). Petitioner alleged that the AAA did not have the authority to arbitrate respondent's anticipatory breach claim because it did not fall within the limited scope of the parties' agreement to arbitrate. (*Id*).

Petitioner obtained a temporary restraining order prohibiting the AAA from proceeding with the arbitration hearing for a period of ten days. (R5-38-9). The trial court also set a date for an evidentiary hearing on petitioner's request for a permanent injunction. (*Id*). Both the AAA and respondent received actual notice of the court's temporary restraining order and the date of the evidentiary hearing. (*Id*). The AAA filed a letter with the trial court, and served a copy on petitioner and respondent, notifying the court it would not participate in the state-court litigation and encouraging the Orthopedic Center to intervene in the action. (*Id*).

Petitioners filed this action against respondents in the United States District Court for the Northern District of Alabama on July 20, 1999. (R1-1). Petitioners asserted claims for breach of contract, fraud and declaratory relief. (*Id*). In response to the complaint, respondents filed a motion to dismiss, transfer, or stay the action. (R1-3). Respondents argued primarily that the federal district court in Alabama lacked *in personam* jurisdiction over respondents. (*Id*).

With full knowledge of the Alabama state-court action, and rather than seeking to intervene in that action, the Orthopedic Center filed a substantially similar action in the state courts of Florida on July 24, 1999. (R5-38-10). In this action, the Orthopedic Center sought to compel the AAA

arbitrators and MedPartners to arbitrate the very same claim for anticipatory breach of contract that MedPartners had previously sought to enjoin in the Alabama state-court action five days earlier. (*Id*). MedPartners timely removed the Florida state-court action to the United States District Court for the Southern District of Florida based on the diversity of citizenship among the parties. *See* 28 U.S.C. §§ 1332, 1441.

The trial court in the Alabama state-court action held an evidentiary hearing on MedPartners' request for a permanent injunction on July 28, 1999. (R5-38-10). The court then entered a permanent injunction enjoining the AAA from conducting any further arbitration proceedings on the Orthopedic Center's claim for anticipatory breach of contract. (*Id*). However, the court allowed the arbitration of the original dispute over the calculation of the April 1999 payment due under the contract to proceed. (*Id*).

Despite receiving a copy of the Alabama state court's permanent injunction, the AAA informed MedPartners that the anticipatory breach of contract claim would be heard by the AAA arbitrators in violation of the Alabama injunction. (R5-38-Ex. I). MedPartners then filed a petition for contempt of court against the AAA in the Alabama state court. (R5-38-11). The AAA removed the petition to the United States District Court for the Northern District of Alabama based upon the diversity of citizenship between the parties. (*Id*).

In direct defiance of the injunction, the AAA and its arbitrators violated the injunction by proceeding to arbitrate all claims, including the Orthopedic Center's claim for anticipatory breach of contract. (R5-38-12). On August 19, 1999, following a show cause hearing, the district court found the AAA and two of its arbitrators in civil contempt. (*Id*). Following the contempt proceedings, petitioners' action filed against respondents in the United States District Court for the Northern District of Alabama was consolidated with

the action removed from the Circuit Court of Jefferson County, Alabama, which encompassed the permanent injunction against the AAA and the contempt citations. (*Id*).

On September 15, 1999, the Orthopedic Center filed a motion to dissolve the permanent injunction and a second motion to dismiss or transfer the case. (R4-24; R5-26). On September 17, 1999, two days after the Orthopedic Center filed its motion to dissolve the injunction and motion to dismiss or transfer the case, the two AAA arbitrators found in contempt filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit seeking a reversal of the district court's order finding them in civil contempt of court. (R5-28; R5-29). The Eleventh Circuit dismissed their appeal for lack of jurisdiction on May 26, 2000. (R5-41).

Meanwhile, the United States District Court for the Southern District of Florida dismissed the Orthopedic Center's lawsuit on November 10, 1999, whereupon the Orthopedic Center appealed. On April 17, 2001, the Eleventh Circuit reversed the district court's dismissal of the Orthopedic Center's lawsuit, vacated its denial of the Orthopedic Center's motion to compel arbitration and remanded the case for further proceedings. (App. 2a).

While the appeal from the dismissal of the Florida lawsuit was pending in the Eleventh Circuit, respondents filed a notice of appeal in this action on September 6, 2000, stating that they were appealing the district court's "denial" of their motion to dismiss, transfer or stay the case and their motion to dissolve the injunction, both of which were still pending in the district court. Respondents purported to appeal pursuant to 28 U.S.C. § 1292(a) and 9 U.S.C. §§ 16(a)(1)(A) and 16(a)(2). (Appellants' Brief, pp. 1-2). It is undisputed, however, that the district court had not entered any order or ruling on respondents' pending motions. The court presumably did not rule on respondents' motions because

two related appeals were pending in the Eleventh Circuit — one by the AAA arbitrators and one by the Orthopedic Center from the dismissal of the Florida action.

C. Proceedings In The Court of Appeals.

Petitioners filed a motion to dismiss respondents' purported appeal for lack of jurisdiction on October 5, 2000. The Eleventh Circuit later entered an order carrying petitioners' motion with the case. The court below heard oral argument in this case on April 23, 2001. The court issued a two-page unpublished per curiam opinion seven days later on April 30, 2001. (App. 1a-2a).

The court first held that "we have jurisdiction." (App. 2a). The court did not, however, set forth any explanation or rationale for its holding. (App. 1a-2a). Nor did it cite any legal authority in support of its holding. (*Id*). There is absolutely no basis in the court's opinion from which to determine how it concluded that it allegedly had appellate jurisdiction over this case. (*Id*).

The court then summarily remanded the case to the district court with instructions to transfer the case to the United States District Court for the Southern District of Florida "where the companion case of *Brandon, et al. v. MedPartners, Inc., et al.*, No. 00-11946 (11th Cir. 2001), is pending." (App. 2a). The court stated that "[w]e do not now pass on the district court's refusal to dissolve the permanent injunction or dismiss or stay the case in favor of arbitration." (App. 2a). Petitioners filed a timely petition for rehearing and rehearing *en banc*, which the court below denied on June 28, 2001. (App. 5a-6a). This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The court below held that it had jurisdiction to consider an appeal even though the district court had not entered an order or held a hearing on the pending motions underlying the appeal and even though the lack of an order or ruling posed no threat of irreparable harm to any of the parties. In so holding, the court decided an important question of federal law in direct conflict with at least three other federal courts of appeals. In addition, the court below, by totally disregarding the actual procedural posture of this case reflected in the record before it, so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. For these reasons, the Court should issue the writ.

I. The Court Below Decided An Important Question Of Federal Law In Direct Conflict With Decisions Of The Fifth, Sixth And Seventh Circuit Courts Of Appeals On The Same Legal Issue.

In *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984), the Fifth Circuit held that "***mere inaction*** [by a district court] is ***not*** an ***order*** refusing injunctive relief, and is not appealable" pursuant to 28 U.S.C. § 1292(a)(1). 748 F.2d at 951 (emphasis added). In *Overton*, plaintiffs and defendants challenged the City of Austin's system for electing its City Council. The plaintiffs and defendants filed motions seeking the entry of a consent decree mandating a change in the system on two separate occasions and filed two separate appeals claiming that the district court had refused to enter the proposed decree. *Id.* at 945-49. The district court, however, had never entered a formal order or ruling on the pending motions. *Id.* at 945-49, 951.

The Fifth Circuit consolidated the two appeals, but dismissed them for lack of appellate jurisdiction. 748 F.2d

at 943. The court expressly rejected the argument that it had jurisdiction under § 1292(a)(1) on the ground that the district court had "refused" an injunction by failing to enter an order on the motions. *Id.* at 949. The court stated as follows:

> While section 1292(a)(1) appealability requires that there be a "granting, continuing, modifying, refusing or dissolving . . . or refusing to dissolve or modify" an injunction, it also requires that this be done by *order*. Without undertaking an all-encompassing definition of an "order," nothing in the record before us tends to reflect any written or oral "order" of the district court refusing any requested injunctive relief.

748 F.2d at 951 (emphasis added).[1]

The Eleventh Circuit's decision in this case is in direct conflict with the Fifth Circuit's decision in *Overton*. The court below committed the precise error avoided by the Fifth Circuit in *Overton* — exercising appellate jurisdiction despite the absence of an "order" from the district court or any

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1. The court in *Overton* acknowledged that, in extreme circumstances, an appeal might lie "[w]here temporary, immediately effective injunctive relief is requested and the trial court fails to rule after hearing." 748 F.2d at 951, *citing United States v. Lynd*, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962). The court cautioned, however, "that 'it does not follow [from *Lynd*, a voting rights case,] that every failure of a trial court to grant a temporary injunction is tantamount to a "refusal" of such injunctive relief.' " *Id.* at 952, *quoting NAACP v. Thompson*, 321 F.2d 199, 202 (5th Cir. 1963). The court in *Overton* stressed the unusual circumstances present in *Lynd*, including clear indications of bias on the part of the district court and the "vital" need for "immediately effective relief" because of an impending election. 748 F.2d at 951; *see also id.* ("*Lynd* is hence inapplicable . . . because the court's inaction did not deny or render impractical the granting of the injunctive relief plaintiffs sought.").

showing of unusual circumstances creating a pressing need for "immediately effective relief." *See generally* 28 U.S.C. § 1292(a)(1) ("Interlocutory *orders* of the district courts of the United States . . . .") (emphasis added); 9 U.S.C. § 16(a)(1)(A) ("an *order* . . . refusing a stay of any action under section 3 of this title") (emphasis added); 9 U.S.C. § 16(a)(2) ("an interlocutory *order* granting, continuing, or modifying an injunction against an arbitration that is subject to this title") (emphasis added). Mere delay is simply not a sufficient justification for a federal court of appeals to exercise appellate jurisdiction in the absence of an order from a federal district court and exceptional circumstances. The decision by the court below simply cannot be reconciled with the Fifth Circuit's decision in *Overton*.

Also in direct conflict with the Eleventh Circuit's decision in this case is the Sixth Circuit's decision in *United States v. Michigan*, 134 F.3d 745 (6th Cir. 1998) (per curiam). In that case, defendants filed a motion for the immediate termination of a consent decree. 134 F.3d at 747. The plaintiff filed a motion seeking certain discovery in order to permit it to formulate a response. *Id.* The district court entered an order permitting the discovery sought by plaintiff, but stated that evidentiary hearings would be required prior to any decision on the merits of defendants' motion to terminate the consent decree. *Id.* at 747-48. Defendants appealed, arguing that the court of appeals had appellate jurisdiction because the district court had effectively "refused to dissolve" an injunction. *Id.* at 748.

The Sixth Circuit dismissed the appeal for lack of jurisdiction. 134 F.3d at 746. While recognizing that "in a practical sense, any determination that defers a decision on the termination motion at least temporarily denies dissolution of injunctive relief," the court concluded that this "argument proves too much, since any interlocutory order, to the extent

it diverts the court's attention and consideration from pending matters, necessarily prolongs litigation." *Id.* at 749. The court also stated that " '[i]f the cost, delay, and aggravation of litigation' made an order appealable, courts of appeals would be deluged." *Id.*, *quoting R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 431 (7th Cir. 1991). The court held that appellate review of the merits of the motion to terminate the consent decree had to be postponed until after an actual ruling on the motion, despite what the court called defendants' "understandable" sense of urgency. 134 F.3d at 749.

Unlike the Sixth Circuit in *United States v. Michigan*, the Eleventh Circuit in this case apparently viewed the alleged practical effect of the absence of a ruling by the district court as a "continuation" of the injunction and exercised appellate jurisdiction. But by doing so, the court exercised jurisdiction in blatant disregard of the jurisdictional statutes requiring an "order" from the district court before an appeal can be perfected. *See* 9 U.S.C. § 16(a); 28 U.S.C. § 1292(a). Its decision to do so is in direct conflict with the Sixth Court's decision in *United States v. Michigan*.

In addition to being in direct conflict with decisions from the Fifth and Sixth Circuits, the decision below is also in direct conflict with the Seventh Circuit's decision in *Middleby Corp. v. Hussman Corp.*, 962 F.2d 614 (7th Cir. 1992). In *Middleby*, the parties agreed to arbitrate one aspect of a business transaction, which resulted in an arbitral award of $2.4 million. 962 F.2d at 615. The prevailing party filed suit in federal district court to confirm the award and the case was consolidated with a pending action in which the plaintiff had asserted claims for breach of warranty and fraud arising out of the same sale. *Id.* The district court confirmed the arbitration award but refused to enter a judgment until it had resolved the pending claims in the consolidated action. *Id.* The party who obtained confirmation of the arbitration

award appealed, asserting that the court of appeals had jurisdiction to consider the appeal pursuant to 9 U.S.C. § 16(a)(1)(D), which provides for appeals from orders "confirming or denying confirmation of an award or partial award." 9 U.S.C. § 16(a)(1)(D).

The Seventh Circuit held that it lacked jurisdiction and dismissed the appeal. 962 F.2d at 617. The court expressly rejected the argument that "delay . . . is the same thing as 'denying' confirmation." *Id.* at 616. But recognizing that "delay sometimes equates to denial," the court then turned to analogous cases under 28 U.S.C. § 1292 to determine when this is so. The court concluded that "irreparable injury" was the *sine qua non* of jurisdiction in these "effective denial" cases. *Id.* at 616, *citing Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 379 (1987); *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981); *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23 (1966). The court found no irreparable harm to the appellant because it sought money damages only and "[i]nterest on the $2.4 million will compensate [the appellant] for the time value of money." *Id.* at 616.

The Eleventh Circuit in this case, on the other hand, reached the opposite result than the one reached by the Seventh Circuit in *Middleby Corp.* Like *Middleby*, this case too involves claims for money damages arising out of a business transaction. The parties' agreement in this case, like the parties' agreement in *Middleby*, also contains a limited arbitration provision. And just like the appellant in *Middleby*, the respondents in this case attempted to appeal based solely on the trial court's alleged delay in granting the arbitral remedies sought. But unlike the Seventh Circuit in *Middleby*, the Eleventh Circuit in this case exercised appellate jurisdiction despite the absence of an "order" within the meaning of 9 U.S.C. § 16(a), and the absence of any

irreparable injury, in a case involving money damages only.[2] The Eleventh Circuit's decision in this case is completely at odds with the Seventh Circuit's decision in *Middleby* on the same legal issue.

The decision by the court below in this case is in direct conflict with decisions of the Fifth, Sixth and Seventh Circuits and leads to irreconcilable results. The issue presented by this case is also a recurring one on which, as we have shown, the circuit courts are in conflict. This Court should grant the petition for a writ of certiorari because the decision below is legally incorrect and in direct conflict with applicable decisions from at least three other federal courts of appeals on the same legal issue.

II. The Court Below So Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For The Exercise Of This Court's Supervisory Power.

Like all federal courts, the Eleventh Circuit is a court of limited jurisdiction. Its authority is constrained by Article III of the Constitution of the United States and by the narrow confines of Congress' statutory conferral of jurisdiction. *See* U.S. Const., art. III, § 2; *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). Neither the court's exercise of its inherent equitable discretion nor the parties' agreement can confer jurisdiction where none has been authorized by Congress. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 384 (1884). For these reasons, every federal appellate court

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2. Respondents will be adequately compensated for any delay of the resolution of their claim for damages if they ultimately prevail in this case. The parties' contract provides for interest at the rate of 18%, far above any reasonable return possible under present market conditions. (R4-21-Ex. A).

has a special obligation to closely scrutinize its own jurisdiction in each case that comes before it. *See Mitchell v. Maurer*, 293 U.S. 237, 244 (1934).

The Eleventh Circuit's actions in this case violates these fundamental principles. By taking jurisdiction of an appeal when the district court has issued no order and held no hearing on the underlying motions, the court below attempted to unilaterally expand its jurisdiction beyond the limits imposed by the clear and unambiguous language contained in 28 U.S.C. § 1292(a) and 9 U.S.C. § 16(a).[3] To make matters worse, the court did not even bother to cite any legal authority or factual basis in its two-page unpublished opinion to support its finding of jurisdiction. (App. 1a-2a). The court did not do so because there is no such basis.

This Court has made clear, moreover, that the costs associated with ongoing litigation in the "wrong" forum, and a delay in commencing proceedings in the "right" one, are insufficient to establish that a district court's order would be "effectively unreviewable" after final judgment. *See, e.g., Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988);

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3. The federal courts of appeals have allowed interlocutory appeals on the ground that delay constitutes an "effective denial" *only* under circumstances where irreparable harm was clearly present and the case would be unreviewable at a later date. *See, e.g., Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992); *Rolo v. General Dev. Corp.*, 949 F.2d 695 (3d Cir. 1991); *Cedar Coal Co. v. United Mine Workers of America*, 560 F.2d 1153 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978); *United States v. Lynd*, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962). This requirement flows directly from this Court's decisions mandating a narrow construction of § 1292's exception to the final judgment rule. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478, 480 (1978).

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985). In this case, the district court's alleged delay in ruling on respondents' motions resulted at most in a postponement of the desired arbitration.[4] In no sense was this purported "injury" an "irreparable" one sufficient to support appellate jurisdiction. *See Overton v. City of Austin*, *supra*; *United States v. Michigan*, *supra*; *Middleby Corp. v. Hussman Corp.*, *supra*. *See generally Carson v. American Brands, Inc.*, 450 U.S. at 84.

The decision below is unprecedented for an additional reason. As this Court has long recognized, the district courts are masters of their own dockets and of the pace and timing of resolution of the cases before them. *See, e.g.*, *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). This power "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* at 254. Yet it is just this sort of decision which the Eleventh Circuit here, through an impatient and unprecedented usurpation of power, sought to question and nullify.

Indeed, Congress has expressed its "judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants, and that the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. at 436 (emphasis in original). Appeal "gives the upper court a power of review, not one of intervention." *Id.* (citation and internal quotations omitted). *See also Firestone Tire & Rubber Co.*

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4. In fact, the parties could have proceeded to the arbitration of the Orthopedic Center's original claim because the injunction only prevented arbitration of certain other issues. The Orthopedic Center declined to do so, however.

v. Risjord, 449 U.S. 368, 374 (1989) ("Permitting piecemeal appeals would undermine the independence of the district judge . . . ."); *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966) (warning against opening the "floodgates" of interlocutory appeals).

In sum, the Eleventh Circuit's decision is completely at odds with the controlling legal principles and the very nature of our federal judicial system. Respect for our system of justice is not well served by the blatant disregard of established legal procedures and settled legal principles. The ultimate responsibility for the proper functioning of the federal judiciary rests squarely on this Court. The not infrequent grant of certiorari in cases involving federal jurisdiction, practice and procedure reflects the Court's awareness of its responsibility. The Court should issue the writ in this case because the question presented is of fundamental importance to sound, impartial and uniform administration of justice in the courts of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

PER CURIAM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, ENTERED AND FILED APRIL 30, 2001

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

APRIL 30 2001

THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14773

D.C. Docket Nos. 99-01862-CV-C-S
99-02113-CV-C-S

MEDPARTNERS, INC.,
MEDPARTNERS ACQUISITION CORPORATION,

Plaintiffs-Appellees,

versus

BRANDON, JONES, SANDALL, ZEIDE, KOHN, CHALAL & MUSSO, P.A., d.b.a. Orthopedic Center of Palm Beach County, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(April 30, 2001)

Before DUBINA and KRAVITCH, Circuit Judges, and DUPLANTIER*, District Judge.

PER CURIAM:

This appeal arises out of a contract dispute regarding the scope of an arbitration clause. In an opinion issued in a companion case by a panel of this court on April 17, 2001, the court held that because the Orthopedic Center was not a party to a suit brought by MedPartners against the American Arbitration Association it would not comport with due process to preclude the Orthopedic Center from relitigating the issues decided by the Alabama State Court. *See Jones, et al. v. MedPartners, Inc., et al.*, No. 00-11946 (11th Cir. April 17, 2001) (unpublished). For that reason, the court reversed the district court's grant of MedPartners's motion to dismiss and vacated its denial of the Orthopedic Center's motion to compel arbitration and remanded the case for further proceedings.

After reviewing the record in the present appeal, as well as reading the parties' briefs and having the benefit of oral argument, we conclude that we have jurisdiction. We also conclude that we should remand this case to the district court with directions that the district court transfer this case to the United States District Court for the Southern District of Florida where the companion case of *Brandon, et al. v. MedPartners, Inc., et al.*, No. 00-11946 (11th Cir. 2001), is pending. We do not now pass on the district court's refusal to dissolve the permanent injunction or dismiss or stay the case in favor of arbitration.

REMANDED with instructions.

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* *Honorable Adrian G. Duplantier, U.S. District Judge for the Eastern District of Louisiana, sitting by designation.*

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

Apr 30, 2001

THOMAS K. KAHN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-14773

District Court Docket Nos.
99-01862-CV-C-S & 99-02113-CV-C-S

MEDPARTNERS, INC., MEDPARTNERS ACQUISITION CORPORATION,

Plaintiffs-Appellees,

versus

BRANDON, JONES, SANDALL, ZEIDE, KOHN, CHALAL & MUSSO, P.A. d.b.a. Orthopedic Center Of Palm Beach County, JOSEPH B. CHALAL, M.D., MARVIN A. KOHN, M.D., EMILIO MUSSO, M.D., EDWARD W. SANDALL, M.D., MICHAEL S. ZEIDE, M.D.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: April 30, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

ISSUED AS MANDATE

JUL 06 2001

U.S. COURT OF APPEALS
ATLANTA, GA.

PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JUNE 28, 2001

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUN 28 2001

THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-14773-II

MEDPARTNERS, INC.,
MEDPARTNERS ACQUISITION CORPORATION,

Plaintiffs-Appellees,

versus

BRANDON, JONES, SANDALL, ZEIDE, KOHN, CHALAL & MUSSO, P.A., d.b.a. Orthopedic Center of Palm Beach County, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: DUBINA and KRAVITCH, Circuit Judges, and *DUPLANTIER, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

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* Honorable Adrian G. Duplantier, U.S. District Judge for the Eastern District of Louisiana, sitting by designation.

Supreme Court, U.S.
FILED
NOV 5 2001
CLERK

No. 01-535

IN THE

Supreme Court of the United States

CAREMARK RX, INC. and MEDPARTNERS ACQUISITION CORPORATION,

Petitioners

v.

BRANDON, JONES, SANDALL, ZEIDE, KOHN, CHALAL & MUSSO, P.A., *et al.*,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioners' Rule 29.6 Statements were set forth at page ii of their Petition for a Writ of Certiorari, and there are no amendments to those Statements.

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ARGUMENT IN REPLY

I. Respondents' Own Brief In Opposition Highlights The Conflict Among The Courts That Have Addressed The Question Presented By This Case.

Respondents have conceded repeatedly that the court below exercised jurisdiction to review the district court's "denial" of respondents' motions, despite the undeniable fact that "[n]o action by the Northern District of Alabama was ever taken" on those motions. (Brief in Opp. 3; *see also id.* at 5, 6, 7, 12). Courts from other jurisdictions have uniformly held that appellate jurisdiction will lie in the absence of an order or ruling by a federal district court *only* when exceptional circumstances exist that pose a threat of irreparable harm to the appellant and the case would be unreviewable at a later date. (*See* Pet. 8-14 & n.3). In contrast to these other courts, the Eleventh Circuit abandoned these requirements and gave no reasons whatsoever for exercising appellate jurisdiction. (*See* Pet. App. 1a-2a).

In an attempt to persuade the Court that the Eleventh Circuit's exercise of jurisdiction was consistent with prior precedent, respondents point to several cases in which other courts have recognized a right to appellate review "in certain rare cases in which the district court in fact issued no order at all." (Brief in Opp. 12-13) (citations omitted). Respondents' argument is totally wide of the mark, however, because *all* of those decisions turned on an express finding of irreparable injury, a finding which is notably absent from the Eleventh Circuit's decision in this case. (*See* Pet. App. 1a-2a).

Relying primarily on the Fifth Circuit's decision in *United States v. Lynd*, 301 F.2d 818 (5th Cir.), *cert. denied*, 371 U.S. 893 (1962), respondents argue that a district court's

delay in granting a preliminary injunction is immediately appealable. (Brief in Opp. 12-13). The Fifth Circuit itself has eschewed such a sweeping expansion of appellate jurisdiction. In *Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984), the Fifth Circuit expressly cautioned that " 'it does not follow [from *Lynd*] that every failure of a trial court to grant a temporary injunction is tantamount to a "refusal" of such injunctive relief.' " 784 F.2d at 952, *quoting NAACP v. Thompson*, 321 F.2d 199, 202 (5th Cir. 1963).[1]

Indeed, the Fifth Circuit in *Overton* stressed the unusual circumstances presented in *Lynd*, including clear indications of bias on the part of the district court and the "vital" need for "immediately effective relief" due to an impending election. *Overton*, 748 F.2d at 952. That is not the situation here. In the Fifth Circuit, therefore, but not in the Eleventh Circuit, *Lynd* is inapplicable when the "court's inaction d[oes]

1. Respondents' reliance on *Lynd* is misplaced for an even more fundamental reason. In *Lynd*, as well as all of the other cases which have relied upon it to support a finding of appellate jurisdiction in the absence of an order or ruling, the courts were faced with a motion seeking preliminary injunctive relief rather than, as here, a motion to dissolve an injunction. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992); *Rolo v. General Dev. Corp.*, 949 F.2d 695 (3d Cir. 1991); *Cedar Coal Co. v. United Mine Workers of America*, 560 F.2d 1153 (4th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978).

There is an obvious reason for this difference. Preliminary injunctions are specifically designed to preserve the status quo in the face of an impending change in circumstances. The failure to enter a preliminary injunction might be expected to result in immediate and irreparable harm, justifying expedited appellate review. On the other hand, once an injunction is in place, the injunction, by its very nature, will preserve the relative positions of the parties pending further proceedings. Accordingly, mere delay in ruling on a motion to dissolve an injunction will not pose a threat of irreparable harm that would make the case unreviewable at a later date. This case is no exception.

not deny or render impractical the granting of the relief sought." *Id.* at 951. The decision below is simply irreconcilable with the Fifth Circuit's decision in *Overton*.

The other decisions relied upon by respondents also highlight the Eleventh Circuit's sharp break with the approach taken by the other federal courts of appeals on the issue presented by this case. In *Cedar Coal Co. v. United Mine Workers of America*, *supra*, a coal company sought a preliminary injunction to halt an on-going strike at several of its mines. 560 F.2d at 1157-59. The district court entered a temporary restraining order and initially set a hearing on the company's motion for a preliminary injunction. *Id.* Later, however, the district court continued the hearing on the motion "indefinitely," allowing the previously entered restraining order to expire and the strike to continue. *Id.* at 1161. The company then appealed.

The Fourth Circuit exercised appellate jurisdiction despite the district court's failure to rule on the motion for a preliminary injunction, describing the case before it as "indistinguishable" from *Lynd*. 560 F.2d at 1161. Indeed, *Cedar Coal*, like *Lynd*, involved the sort of imminent harm (the on-going strike) and the concomitant affirmative refusal of the district court to rule on a motion seeking injunctive relief from such imminent harm that sometimes justifies the exceptional exercise of appellate jurisdiction in the absence of an order or ruling by the district court. This case, in contrast, does not involve any such exceptional circumstances. (*See* pages 4-6, *infra*).[2]

2. The remaining decisions upon which respondents rely do not support their position either. In *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507 (11th Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995), the Eleventh Circuit entertained an appeal from the district court's written orders. 14 F.3d at 1511 & 1515. The court expressly recognized, in dicta, that only "rare" and exceptional (Cont'd)

Respondents argued in the court below that the district court's delay in ruling "for a year" was itself sufficient grounds for the exercise of appellate jurisdiction. (*See, e.g.*, Brief in Opp. 7-9). The Eleventh Circuit exercised appellate jurisdiction based on the district court's inaction or delay alone, with no mention or analysis of the irreparable injury requirement. (Pet. App. 1a-2a). The approach and result reached by the court below in this case are in direct conflict with decisions of the Fifth, Sixth and Seventh Circuits and lead to irreconcilable results. *See Overton v. City of Austin*, 748 F.2d 941 (5th Cir. 1984); *United States v. Michigan*, 134 F.3d 745 (6th Cir. 1998) (per curiam); *Middleby Corp. v. Hussman Corp.*, 962 F.2d 614 (7th Cir. 1992).

II. Respondents Have Not And Will Not Suffer Irreparable Injury.

Recognizing that the decision below is fundamentally flawed because of the lack of a finding of irreparable harm, respondents now suggest that the court below may in fact have found irreparable harm before exercising jurisdiction. (Brief in Opp. 19-20). Respondents' irreparable injury arguments advanced in their Brief in Opposition filed with this Court are based entirely on alleged factual assertions by counsel, unsupported in the record, or on novel legal theories never before raised in this action. They offer no cure for the Eleventh Circuit's exercise of appellate jurisdiction in the absence of an order from the district court *and* the absence of irreparable injury.

(Cont'd)
circumstances like those presented in *Lynd* itself would justify appellate review in the absence of an order from the district court. *Id.* at 1516. In *In re Public Serv. Co. v. Northeast Utilities*, 963 F.2d 469 (1st Cir.), *cert. denied*, 506 U.S. 908 (1992), the court simply held that a bankruptcy reorganization plan, which had already been put into effect, could not be undone, rendering an appeal of the propriety of the plan moot. 963 F.2d at 473-74.

No irreparable injury exists here. Unlike the right to vote in the upcoming election involved in *Lynd*, or the right to halt an unlawful and destructive strike like the one involved in *Cedar Coal*, the Orthopedic Center's right to arbitrate could not be eliminated or mooted by the mere passage of time. Indeed, MedPartners' refusal to pay the Orthopedic Center's physicians bonus compensation (not "back compensation" as asserted by respondents) under the contract because of their drop in performance was the original issue that MedPartners *did* agree to arbitrate and the issue which MedPartners has *always* agreed to arbitrate. (Pet. 3). It is only the claim for anticipatory breach of contract seeking *future* damages in excess of $48 million over the remaining fifteen years of the contract that MedPartners has contested as being outside the scope of the parties' arbitration agreement. (R5-38-6). In any event, if the Orthopedic Center had ultimately prevailed on its motions, the arbitration could then have proceeded regardless of any delay which may have been occasioned by the district court.[3]

Nor is there any merit to respondents' assertion that it would have lost its right to effective appellate review of the arbitration issue if the court below had dismissed the appeal for lack of jurisdiction. The proper remedy for the district court's inaction or delay in ruling on respondents' motions would have been for respondents to file a petition for a writ of mandamus with the Eleventh Circuit, seeking an order from the court of appeals directing the district court to rule.

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3. Contrary to respondents' unsupported assertion, the record clearly establishes that MedPartners, now known as Caremark Rx, Inc., is in excellent financial condition and would be able to satisfy any award or judgment in the Orthopedic Center's favor which could result from the arbitration of *both* of the Orthopedic Center's claims. (*See* Exhibit A to Appellees' Reply to Appellants' Response to Motion to Dismiss in the record below, Oct. 19, 2000 (SEC filing for Caremark Rx, Inc. showing net revenue of more than $1 billion for the year 2000)).

See, e.g., *Madden v. Mayers*, 102 F.3d 74, 78 (3d Cir. 1996); *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990); *Fernandez-Roque v. Smith*, 671 F.2d 426, 430-31 (11th Cir. 1982); *City of Parma, Ohio v. Levi*, 536 F.2d 133, 135 (6th Cir. 1976).

In addition, if the district court had been allowed to rule on the Orthopedic Center's motions, and had denied them, immediate appellate review would have been available pursuant to 9 U.S.C. § 16(a) and 28 U.S.C. § 1292(a). Review of the arbitration issue was also available via the Orthopedic Center's separate lawsuit pending in the Southern District of Florida. Indeed, the Orthopedic Center had already taken an appeal from that proceeding, which was pending in the Eleventh Circuit at the time respondents filed a Notice of Appeal in this case. The Florida case was reinstated by the Eleventh Circuit and proceeding forward at the time the Eleventh Circuit issued its opinion in this case. (*See* Pet. App. 2a). As respondents themselves point out in their discussion of *United States v. Michigan*, *supra*, the availability of other effective avenues for appellate review preclude any irreparable injury resulting from a district court's inaction or delay. (Brief in Opp. 18).[4]

III. This Case Presents A Live And Ongoing Controversy.

The "final" rulings issued by the Southern District of Florida in the Alabama cases over which the Eleventh Circuit improperly exercised jurisdiction and transferred to Florida do not render this case moot because these so-called "final"

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4. The court's decision in *Reliance Nat'l Ins. Co. v. Seismic Risk Ins. Servs.*, 962 F. Supp. 385 (S.D.N.Y. 1997), upon which respondents rely, has no application here because that case involved a party's request to a federal district court to enjoin a state court proceeding pending arbitration. It obviously has no relevance to the issue of appellate jurisdiction presented here.

rulings occurred after the Eleventh Circuit's unauthorized exercise of appellate jurisdiction. As a result, the rulings upon which respondents base their mootness argument are void. *See, e.g., United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661-62 (1st Cir. 1990) (a plain usurpation of power renders a judgment void); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224-25 (10th Cir. 1979) (same). Petitioners have also recently appealed the two "final" rulings issued by the Southern District of Florida to the Eleventh Circuit.

A case becomes moot when the controversy between the parties is no longer live or when one of the parties lacks a personal stake in the outcome of the lawsuit. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). These subsequent proceedings demonstrate that there is a "live" controversy between petitioners and respondents and that petitioners undoubtedly have a personal stake in the outcome of this controversy with respondents. Respondents have provided this Court with no legal authority to the contrary.

IV. Respondents' Own Brief In Opposition Demonstrates The Need For The Exercise Of This Court's Supervisory Power.

Respondents have conceded repeatedly in their Brief in Opposition, as mentioned earlier, that the district court did not enter an order or ruling on their motions. (*See* Brief in Opp. 3, 5, 6, 7, 12). Respondents attempt to downplay the significance of this critical omission by arguing that the Eleventh Circuit exercised jurisdiction for the purpose of enabling "the parties to promptly reach an efficient resolution of the issues between them in a single federal court in Florida." (*Id.* at 11-12). The Court should be shocked at respondents' argument.

The Eleventh Circuit's opinion in this case is completely silent about the court's intention or purpose for exercising appellate jurisdiction. (*See* Pet. App. 1a-2a). Concerns for judicial efficiency, moreover, do not confer jurisdiction on the courts of appeals when none has been granted by an Act of Congress. This Court and others have warned against opening the floodgates of interlocutory appeals that would inevitably result by such indiscriminate usurpation of power by the courts of appeals. *See, e.g.*, *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966) (warning against opening the "floodgates" of interlocutory appeals under 28 U.S.C. § 1292(a)(1)); *United States v. Michigan*, 134 F.3d 745, 749 (6th Cir. 1998) ("If the cost, delay and aggravation of litigation made an order appealable, the courts of appeals would be deluged."); *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430, 431 (7th Cir. 1991) (same).

This Court has also declared that a district court's management of a case " 'ought not to be critically examined and re-examined by the cumbersome method of appeal before he has approached the stage of adjudication.' " *Switzerland Cheese Ass'n v. E. Horne's Market, Inc.*, 385 U.S. at 25 n.3, *quoting Peter Pan Fabric, Inc. v. Dixon Textile Corp.*, 280 F.2d 800, 805-06 (2d Cir. 1960) (Clark, J., dissenting). This would be " 'an intolerable burden for [the courts of appeals], an improper and uncertain interference with trial court discretion, a confusing invitation to indiscriminate appeals in the future — all contrary to settled federal law against piecemeal appeals.' " *Id.* Respondents' "efficiency" argument flies in the face of all of these warnings.

The Court should also reject respondents' suggestion that the Eleventh Circuit's usurpation of power and unauthorized expansion of appellate jurisdiction is not an "important" issue for resolution because the court's opinion is unpublished and "contains no discussion of the contents of the record,

the parties' briefs, or oral argument." (Brief in Opp. 11). It is precisely this type of furtive conduct by the court below that cries out for the exercise of this Court's supervisory power. The courts of appeals cannot be permitted to trample upon Article III of the Constitution of the United States and Acts of Congress under the cloak of unpublished opinions. *See generally* Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Decisions Pose a Greater Threat?*, 44 Am. U.L. Rev. 757 (1995).[5]

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5. Of course, it is not uncommon for this Court to grant review and issue full opinions on the merits in cases in which the court below issued an unpublished opinion. *See, e.g., Becker v. Montgomery*, 532 U.S. 757 (2001); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *United States v. Cleveland Indians Baseball Company*, 532 U.S. 200 (2001).

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the petition, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. In addition, petitioners respectfully request the Court to reverse or vacate the decision below and remand this case with directions to the court below to transfer the two underlying actions back to the United States District Court for the Northern District of Alabama to allow a hearing and ruling on the motions pending at the time of respondents' improvident appeal to the Eleventh Circuit.

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